IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL, WASHINGTON, D.C.

REPLY BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE

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The American Civil Liberties Union, whose interest as amicus curiae is stated in our initial brief, is filing this Reply Brief pursuant to Rule 42 with the written consent of both petitioner and respondent. Although we believe that the central problems in this case are adequately discussed in the principal briefs, the Government's brief contains certain arguments that, while for the most part peripheral, require comment. We will consider these arguments in the order in which they are presented in the Government's brief.

A. *Standards to be Applied to Cases Arising in the District of Columbia*

We would like to make it clear that, while we agree with the Government that in some respects this case involves problems of considerable complexity, we do not believe that these problems can be disposed of by application of the sort of "plain error" rule that the Government appears to believe is applicable to cases—or at least insanity cases—arising in the District of Columbia. (Govt. Br. pp. 21-23) Neither *Fisher* v. *United States*, 328 U.S. 463 (1946), *Griffin* v. *United States*, 336 U.S. 704 (1949), nor any other decision of this Court establishes such a rule. *Fisher* did not turn upon constitutional claims or even issues of statutory construction. Rather, petitioner asked this Court to require the District of Columbia courts to depart from the common law and give partial responsibility instructions in criminal cases. To this the Court replied, "The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern." *Id.*, at 476. Similarly, *Griffin* involved only a question of admissibility of evidence as to which the Court of Appeals had not spoken. In remanding the case for further consideration, this Court stated, "[T]he Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations." *Id.*, at 714. Plainly, these cases do not stand for the proposition that this Court should adopt an attitude of unique deference to the Court of Appeals where the question is whether the decision below *does* "offend statutory or constitutional limitations." Indeed, if anything, the inference is quite the contrary. Compare *Stewart* v. *United States*, 366 U.S. 1 (1961), where this Court reversed a criminal conviction in

the District of Columbia on the ground that a question by the prosecutor that concededly impinged upon petitioner's Fifth Amendment rights was prejudicial. And see the cases listed by Mr. Justice Murphy in his dissent in *Fisher* in which this Court has reviewed other issues arising in the District of Columbia. 328 U.S., at 490-491.

Of course, this Court always reviews Congressional legislation "with great restraint" (Govt. Br. 23) where it is challenged as unconstitutional. And under well established principles of constitutional law no objection can be made simply because Congress enacts a statute for the District of Columbia that is different from federal legislation affecting other jurisdictions, since District of Columbia problems may well be different. But this does not mean that the Court will or should refrain from applying its traditional standards in dealing with other constitutional objections to such statutes or from using ordinary principles of construction in interpreting them.

So far as the District of Columbia courts are concerned, there are, to be sure, certain types of local law issues as to which they may have special competence, just as other Courts of Appeals may be thought to be in an advantageous position in construing certain questions of state law. See, *e.g.*, *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 527 (1960). As we have indicated, we believe that many Durham Rule issues normally fall in this category. But this case does not raise issues concerning the scope or application of the Durham Rule, and we fail to see why the Court of Appeals should be thought to be in a better position than this Court to deal with any of the questions presented here. Nor does the Government advance any specific reasons supporting its generalized plea for deference.

In short, we do not believe that the District of Columbia is some sort of enclave in which the Government can take

action affecting the liberty of citizens with greater license because this Court in scrutinizing that action will close one eye out of "deference" to Congress or the District of Columbia courts.

B. *Construction of Rule 9*

As we have indicated in our principal amicus brief (hereinafter cited as "Br."), we believe it unnecessary for this Court to reach the question whether under Rule 9 of the Municipal Court Criminal Rules the trial judge had any discretion to refuse a guilty plea competently tendered, because we believe that in any event the judge abused any discretion he might arguably have had. (Br. p. 45) The approach we suggest seems to us advisable because it would avoid a construction of the Rule that might have unforeseen ramifications.

Nonetheless, we believe it desirable to comment briefly upon the Government's argument with respect to the construction issue. (Govt. Br. pp. 24-31) The inferences the Government draws from the course of revision of Rule 11 are nothing more than possible; and the Government's reliance upon the Advisory Committee's citation of *United States* v. *Trinder*, 1 F. Supp. 659 (D. Mont. 1932), is misplaced, for there is no indication that the defendants in *Trinder*—who were minors, Indian wards of the Government, and apparently unrepresented—objected to the court's action in dismissing the prosecution. The same is true of *United States* v. *Echols*, 253 Fed. 862 (S.D. Tex. 1918) (where again there is no notation of appearance by counsel for the defendant). And in *United States* v. *Bysozoski*, 144 F. Supp. 806 (D. N.J. 1956), the court held that the indictment did not charge an offense under the proper statute, but indicated that if a new indictment were brought the defendant could renew his guilty plea. Finally, the only other federal case cited by the Government, *Tomlinson*

v. United States, 93 F.2d 652 (D.C. Cir. 1937), is plainly not in point, since it dealt with an attempt to change a plea from not guilty to guilty, a matter which is, of course, entrusted to the court's discretion.[1] See Rule 32(d), F. R. Crim. P.

C. *Abuse of Discretion*

With respect to the question whether the trial judge abused his discretion in refusing to accept the guilty plea (assuming *arguendo* that he had such discretion), we wish to comment only upon the Government's reliance upon certain authorities.[2]

The cases cited in our prior brief in which courts have ruled that only the defendant may raise an insanity defense are particularly relevant, as we pointed out, because they were rendered in jurisdictions that have mandatory commitment statutes. (Br. pp. 48-50) In contrast, the Texas decisions relied upon by the Government (Govt. Br. pp. 29-30) were rendered in a jurisdiction in which, so far as we have been able to discover, there was at the time no provision at all for commitment after acquittal on grounds of insanity, much less for mandatory commitment.[3] Where

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[1] While we considered it advisable to point out the irrelevance of *Tomlinson*, we do not believe that the Government's use of the case suggests it is relying upon it. (Govt. Br. pp. 30-31) It hardly could, in view of its concession that petitioner's initial pleas of not guilty in the case at bar should be disregarded "because they were apparently entered when petitioner was without a lawyer and, although he waived counsel . . . there is serious doubt that he was competent at the time." (Govt. Br. pp. 23-24)

[2] While the Government does not cite these authorities in connection with this issue, we believe they are relevant since they deal with the defendant's right to control the introduction of the insanity defense, and this in turn has a direct bearing upon the trial judge's decision to accept or reject the guilty plea.

[3] Under the statute in effect today, there is no commitment unless the jury finds that the defendant is "insane at the time of trial." Tex. Code Crim. Proc. Ann., art. 932b, § 1 (Supp. 1958). The predecessor statute, which was the same in this respect, dated only from 1937. Acts 1937, 45th Leg., p. 1172, ch. 466.

the defendant's interests *are* vitally affected, the Texas courts have taken quite a different attitude. In *Ex parte Hodges*, 314 S.W. 2d 581 (Tex. Cr. App. 1958), under a newly established procedure, the state had secured from the court, over the defendant's objection, a pre-trial determination with respect to sanity. The jury found him sane at the time of the offense but insane at the time of the hearing, and consequently the trial was postponed. The appellate court held that conducting this hearing over the defendant's objection, entered by advice of counsel, deprived him of the right to a speedy trial and the right to assistance of counsel.

The Government also contends that *Davis* v. *United States*, 160 U.S. 469 (1895), stands for the rule that the insanity defense may be raised by the prosecution or the court against the wishes of the defendant. (Govt. Br. pp. 36-37) Entirely apart from the consideration that the appellant in *Davis* was not subject to a mandatory commitment law, the fact is that *Davis* simply does not stand for the rule advanced by the Government. In *Davis* the defendant *had* raised the insanity defense and had relied upon it heavily, and the issue decided by this Court was simply whether the trial judge had correctly instructed the jury with respect to that defense. The entire opinion was written within those terms of reference, and we are convinced that not even by the most prodigious straining can *Davis* be read to support the Government's position. And if the "rule prevailing in the federal courts" is that "insanity . . . can be raised by either the court or the prosecution" (Govt. Br. p. 36), we can say only that *Davis* does not establish the rule, the Government cites no other cases in which it has been applied, and we know of none outside the District of Columbia.

In this connection, it is noteworthy that the Government distinguishes *Rex* v. *Oliver*, 6 Cr. App. 19 (1910), on the ground that the language from that case cited in our brief

"was uttered in a case in which insanity had been raised as a defense by the defendant...." (Govt. Br. p. 38) For some reason the Government apparently thinks that consideration not important with respect to *Davis*. Moreover, as a reading of these two cases will disclose, the language from *Oliver* is unequivocally addressed to the issue here involved, whereas the *Davis* opinion does not even purport to deal with that issue.[4]

D. *Construing the Statute Not to Apply Where the Defendant Does Not Raise the Insanity Defense or Alternatively Where He Attempts to Plead Guilty*

With respect to this issue, we believe it necessary to comment only upon the Government's response to our argument that a literal reading of the statute would not sustain the Government's position because under such a reading an affirmative finding of insanity would be a prerequisite to

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[4] We find unexceptionable, for example, the language quoted by the Government—"whenever the condition of the prisoner's mind is put in issue by such facts proved on either side" (Govt. Br. p. 36)—since all that this means, in the context of a case in which the defendant relied upon the insanity defense, is that he was entitled to take advantage of relevant evidence introduced by the Government.

We are obliged to note that, like the Government, we have not searched the English cases thoroughly. (Govt. Br. p. 30 n. 13) We assume, however, that the Royal Commission did. Still, we must call to the Court's attention a very recent case in which one justice, in dicta, indicated that he would not abide by the traditional rule. *Bratty* v. *Attorney General for Northern Ireland*, 3 Wkly. L.R. [1961] 965, 980. His remark was made, however, in connection with the question whether, if the accused defends on grounds of "automatism" (involuntarism), the prosecution can urge that his evidence relates to insanity and not to failure of the prosecution to prove that the act was voluntary. See *Regina* v. *Kemp*, [1957] 1 Q.B. 399. The difference is considerable, since in England the burden is on the defendant to establish insanity. See *Bratty* v. *Attorney General for Northern Ireland*, *supra*, at 981. This factor, it may also be noted, makes the English general rule particularly strong support for petitioner, since where the defendant must prove insanity there is a more substantial factual basis for commitment after acquittal on grounds of insanity than there is in the District of Columbia.

commitment. (Br. pp. 51-52) While it is not clear to us whether the Government denies that a literal reading would lead to this result, the Government does, at any rate, assert that Congress was "well aware of existing practice in the District of Columbia" (that a reasonable doubt as to sanity sufficed for acquittal) and consequently "used the words 'acquitted solely on the ground that he was insane' to mean 'found not guilty by reason of insanity,' which of course means not guilty because there was a reasonable doubt as to the accused's sanity." (Govt. Br. p. 44 n. 31) We are not advised as to why the Government is so confident about the nature of Congress' information,[5] nor why, whatever that information was, it is clear that Congress intended language that seems to say one thing to mean something else. At any rate, the Government's argument hardly counters ours, which was simply that the question could not be settled on the basis of a literal reading of the statute.[6]

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[5] See Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 Geo. L.J. 294, 307 (1960) (The language used in the Committee Report indicates that Congress was laboring under the presumption that "a verdict of 'not guilty by reason of insanity' in the District of Columbia in 1955 represented an affirmative finding by the jury that the defendant was in fact insane.")

[6] The Government also asserts that the literal construction we describe would produce an "absurd" result. (Govt. Br. p. 44 n. 31) Given the strength of the adjective, we are not sure what it is that the Government means, since a number of states have commitment procedures that depend upon a finding of insanity at the time of commitment, as we pointed out in our principal brief. (Br. p. 31 n. 20) Moreover, it is perhaps relevant that, although the Court of Appeals has rejected the construction of the statute we believe to be suggested by a literal reading, *Ragsdale* v. *Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960), at least one district judge has expressed a contrary view. See *United States* v. *Naples*, 192 F. Supp. 23, 40 (D. D.C. 1961).

E. *Construing the Statute Not to Apply Where the Crime Charged Is a Non-Violent Misdemeanor*

The Government urges first that the Court should not consider whether the commitment statute should be construed not to apply to non-violent misdemeanors because this argument was not made by petitioner in his habeas corpus petition, nor to the Court of Appeals, nor to this Court in the petition for certiorari. (Govt. Br. pp. 44-45) We submit that refusal of the Court to consider the issue would not be appropriate under the circumstances of this case for the following reasons: (1) The issue is one of law and consequently no fact-finding hearing in the District Court was necessary. (2) The District Judge would have been bound by the decision of the issue adversely to petitioner in *Overholser* v. *Russell*, 283 F.2d 195 (1960). (3) The issue was considered and decided by both majority and minority in the Court of Appeals in this case. (R. 37, 41-44) (4) Consequently, to tell petitioner to begin all over would be to subject him to the futility of relitigating an issue already decided against him in the lower courts—if, indeed, those courts would entertain a successive petition for habeas corpus raising this question and if they would permit an *in forma pauperis* appeal—without in any way benefitting this Court in disposing of the question. This Court has even waived its Rule concerning timeliness of petitions for certiorari in order to avoid this type of "wasteful circuity." *Heflin* v. *United States*, 358 U.S. 415, 418 n. 7. (5) Finally, the suggested construction of the statute would avoid complicated constitutional questions, and under such circumstances the Court has based its disposition of a case upon issues raised by neither party at any time, even in the briefs in this Court. See, *e.g.*, *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384 (1960).

Next, the Government maintains that at any rate only

subsection 301(d) (the commitment provision) is before the Court, not subsection 301(e) (the release provision), and that the language of the former provides no basis for the suggested construction since the reference to "dangerousness" is found only in the later. (Govt. Br. pp. 46-47) We discuss *infra* pp. 16-19 whether this Court should consider questions relating to subsection 301(e). If we are correct in our view that it should, then, as we have pointed out, this Court could adopt the position of the dissenters below by holding that, whatever might be said about petitioner's initial commitment, there is no basis for retaining him in custody because 301(e) applies only to persons committing a crime different from the petitioner's and the Government has not instituted civil commitment proceedings on the basis of the mental examination made pursuant to the 301(d) commitment. (Br. pp. 53, 55 n. 32)

But even assuming that only the 301(d) commitment is in issue, it is our position, as we have stated, that the same standard of "dangerousness" should apply. We will not repeat our argument, except to state our belief that it is more sensible to read the two subsections as reflecting the same criteria for commitment and release than to read them as embodying disparate standards, since under the latter view persons would be committed who would most probably be able to secure their release but upon whom would be imposed the burden of seeking habeas corpus at some undefined time when the medical examination could be deemed sufficiently complete.[7]

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[7] The Government contends that the statutory language of subsection 301(e) does not imply that a person may be committed only for a dangerous offense because it requires release when "the 'person will *not* in the reasonable future be dangerous to himself or others' (emphasis added), rather than when the person will *no longer* be dangerous." (Govt. Br. p. 47) This assumes that in some way the acquittal on grounds of insanity could amount to a finding that the defendant was in fact dangerous. Of course it could not.

F. *Constitutionality of Subsection 301(d)*

This question is fully discussed in our brief and hence we will restrict ourselves to commenting upon a few specific points made by the Government.

1. With respect to the Government's discussion of the basis for a subsection 301(d) commitment, we would like to make only two observations. First, the Government errs—no doubt inadvertently—in stating that the individual who is committed after an acquittal "is an '*accused* person confined to a hospital for the mentally ill.'" (Govt. Br. p. 49) (Emphasis added.) This category of persons—those not yet tried—is dealt with in subsection 301(b), and naturally their commitment involves questions of an entirely different order than those raised in the case at bar. Second, the Government does not indicate what basis it has for asserting that "the individual involved . . . may very well continue his harmful conduct unless treated." (Govt. Br. p. 52) There is no finding to that effect and there is no record of the trial testimony—even assuming contrary to fact that this testimony would be relevant in a case like this where the commitment was based upon the command of the statute rather than the discretion of the trial judge; and, as the Government concedes elsewhere (Govt. Br. p. 55), all that can be inferred from an acquittal on grounds of insanity is that there was a reasonable doubt as to whether the defendant had a mental disease or defect that caused the criminal act. The Government appears to have lapsed into the same error with respect to the factual basis for a subsection 301(d) commitment that is contained in the Committee Reports. (See Br. p. 27 n. 18)

2. So far as decisions in other jurisdictions are concerned, we adhere to the summary in our principal brief. As we there state, we have discovered only one case outside the District of Columbia squarely upholding a mandatory com-

mitment law, *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; and in the jurisdiction concerned, Kansas, the release procedures are apparently much more liberal than in the District of Columbia. (See Br. p. 31 n. 20) The other cases cited by the Government (except *State* v. *Burris*, 169 La. 520, 125 So. 580, which arguably falls in the *Clark* category) are either Kansas cases or involve discretionary commitment statutes that require a determination as to present mental condition as a basis for commitment.[8] (Govt. Br. pp. 54 n. 38, 55 n. 42)

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[8] Nor is this the only factor distinguishing these cases, as the following brief description of some of them indicates:

Under the statutory procedure involved in *People ex rel. Peabody* v. *Chanler*, 133 App. Div. 159, 117 N.Y. Supp. 322, *aff'd*, 196 N.Y. 525, 89 N.E. 1109, commitment was ordered only if the court "deem[ed] . . . discharge dangerous to the public peace or safety." The court was to base this conclusion "upon the evidence given at the trial and the appearance of the defendant thereat." 133 App. Div., at 161. In its discussion of these procedures as applied to the appellant, the court said: "The plea of insanity is that of a defendant. . . . It cannot then be said that a defendant who makes a plea of insanity and seeks to establish it did not have notice under this provision of a hearing that might reveal his condition of insanity at the time of his trial. . . ." *Id.*, at 162.

In *People ex rel. Peabody* v. *Baker*, 59 Misc. 359, 110 N.Y. Supp. 848, the same statute was involved, and the court pointed out that the defendant had the right to introduce during the trial evidence of his present sanity.

The statute that was attacked in *Ex parte Slayback*, 209 Cal. 480, 288 Pac. 769, did not provide for commitment except by regular civil procedures if "it shall appear to the court that the defendant has fully recovered his sanity." Moreover, the statute applied "Where a person pleads not guilty by reason of insanity."

In *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552, the statute that was upheld did not provide for commitment unless the court deemed discharge to be "manifestly dangerous to the peace and safety of the community." The court observed that the defendant "was tried before a jury, to whom he himself submitted the issue that he was insane when the crime was committed." 81 Pac., at 553.

State v. *Saffron*, 146 Wash. 202, 262 Pac. 970, involved a statute under which the jury was required to find whether mental illness existed at the time of the verdict; whether, if it did not, there was likelihood of a relapse; and whether the defendant "was a safe person to be at large." These issues were to be litigated during the trial on the criminal charge.

3. While we have no way of knowing whether "criminal defendants who are acquitted on grounds of insanity are nearly always committed to mental institutions" (Govt. Br. p. 53), we would like to point out that the only authority cited by the Government is a statement in a Comment (*Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293 (1958)), which in turn appears to rely solely upon the fact that practically all jurisdictions in this country have some sort of statutory commitment procedure. Since only in eleven states do these procedures provide for mandatory commitment (Br. p. 31 n. 20), the basis for the assertion in question appears most dubious.[9]

4. The Government appears to argue that, assuming *arguendo* the commitment under 301(d) is constitutionally infirm, nonetheless the existence of the release provisions of 301(e) preclude relief here because the petitioner "is not to be discharged for defects in the original arrest or commitment," citing *Ekiu* v. *United States*, 142 U.S. 651 (1892). (Govt. Br. p. 54) Wholly apart from the invalidity of the release provisions (a matter we discuss *infra*), the *Ekiu* principle cannot be applied in this case. Where the Government, by the time of the habeas corpus proceeding, establishes its right to custody of the applicant (as it did in *Ekiu* by having the appropriate official make the necessary findings under the alien exclusion statute), relief must of course be denied. But in this case the Government established no right to custody aside from the mandate of the commitment statute; and surely the *Ekiu* principle cannot

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The court held that this procedure did not deprive the appellant of any of his constitutional rights "because appellant himself raised the issues. . . ." 262 Pac., at 972.

[9] In our summary of state legislation in our initial brief, we inadvertently neglected to include Hawaii among the mandatory commitment states. See Hawaii Rev. Laws, 1955, § 258-38.

be construed to impose upon the applicant, once he has demonstrated the invalidity of the commitment, the duty to prove that the Government could not establish such a right. To put the matter baldly, the Government, if we read its argument correctly, is asking this Court to hold that, though persons may regularly be committed to St. Elizabeths under an invalid statute, nonetheless they cannot secure their release unless they affirmatively demonstrate at a subsequent time that they qualify for release under the standards established in other sections of the statute. The implications of such a holding in other areas of the law are obvious, and we are convinced that no authority can be cited in support of the argument.

5. It is somewhat different to argue, as the Government apparently also does (Govt. Br. pp. 54-55), that the "public interest" demands that the "preliminary action" of commitment "not meet any formal requirements." But the only case cited by the Government involving personal liberty that seems to us plainly to apply this principle is *Hirabayashi* v. *United States*, 320 U.S. 81 (1943);[10] and it takes no extended argument to demonstrate that the question whether under the war power a curfew could be imposed on persons of Japanese ancestry in a critical area during a period of extreme national emergency is wholly different from the question presented in the case at bar. The burden of our argument, of course, is that the commitment procedure in question here is wholly unjustified. In other words, we do not quarrel with the principle of *Hirabayashi*, but say only that the extension of that principle in time of peace to a deprivation of liberty of the magnitude of confinement in an insane asylum would be entirely unwarranted and extremely dangerous.

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[10] In *Yakus* v. *United States*, 321 U.S. 414 (1944), the relevant issue was whether a statute denying interlocutory relief pending determination of the validity of a price control regulation was constitutional.

6. The Government suggests that the alternative of a post-trial hearing might reasonably be rejected by Congress because "psychiatrists would not have had a reasonable opportunity to subject [the person] to observation and examination and to report their findings," citing *Ragsdale* v. *Overholser*, 281 F.2d 943 (D.C. Cir. 1960). (Govt. Br. p. 57) In some cases they might, in others they might not. The point is that a hearing would permit the trial judge to determine whether or not there was sufficient basis for a decision. If at least this were required, commitment for further examination where the judge deemed that advisable would not raise problems as serious as those presented in this case. We repeat, the availability of simple and equally efficacious alternatives is relevant to the constitutional issue.

7. The Government contends that commitment on the basis of a reasonable doubt as to sanity at some prior time is appropriate because that is the standard upon which the person has been acquitted. (Govt. Br. p. 56) This seems to us but another way to state the *quid pro quo* argument, which, as we have pointed out, is unavailable to the Government in this case. (Br. pp. 40-41)

8. The Government urges that commitment may be justified upon the basis of an inference, based upon the acquittal, that the defendant "*may* still be mentally ill and therefore *may* repeat his anti-social conduct if not treated;" that this presumption is clearly reasonable; and that petitioner has erroneously assumed the Government must argue that acquittal supports a presumption that the defendant "is in fact mentally ill at the time of the commitment." (Govt. Br. p. 61) While the Government correctly describes the nature of the inference that can be drawn from an acquittal (giving the word "may" a very broad meaning and assuming the evidence at the trial does not counter the inference), it fails to come to grips with the real problem. Basically, our view is that it is wholly unreasonable to

ground commitment upon such an inference alone because it is wholly unreasonable to turn such a tenuous inference into an irrebuttable presumption. (Br. pp. 26-27)

9. Finally, the Government says that petitioner's argument "suffers from the fatal assumption that Congress [in this area] is required to duplicate civil commitment proceedings." (Govt. Br. p. 59) As our discussion of possible alternatives evidences, we do not believe a procedure with some characteristics not present in civil proceedings would necessarily be unconstitutional. All that we say is that there is no adequate basis for the existing differences between the statutes.

G. *Constitutionality of the Release Standards*

The Government argues, first, that the constitutionality of the release standards applied under the statute, as construed by the Court of Appeals, is not properly before this Court. As one reason, the Government maintains that petitioner attacked his detention "solely upon the ground that his *commitment* was invalid." (Govt. Br. p. 63) We believe that the broad-gauged attack of the petition for habeas corpus upon the validity of the section 301 procedures under which petitioner was being held encompassed the claim that the statute's release standards were invalid, at least if they were relied upon by the Government.[11] And

[11] See, *e.g.*, the following portion of the application:

". . . Section 301 . . . is unconstitutional on its face and as construed and applied . . . in that

"1. Section 301(d), properly construed, applies only to defendants who affirmatively raise the insanity defense.

"2. Section 301 . . . fails to provide that a judicial finding must be made . . . that a defendant is at the time of the trial . . . mentally ill and socially dangerous . . . or in the alternative, requiring an immediate report back to the Court with a full hearing within a few days after an automatic commitment for a judicial

the Government did rely upon those standards, for it contended that petitioner had to meet them in order to secure his release. (R. 8, 11) [12] Thus, it seems to us that from the start the question whether petitioner could constitutionally be required to meet the release standards imposed by the statute has been properly in the case.

In any event, the constitutionality of these provisions is necessarily before this Court for a wholly independent reason, *i.e.*, the Government's concession that the constitutionality of the commitment provision depends in large part upon the existence of a habeas corpus remedy "with constitutionally sufficient standards governing burden of proof." (Govt. Br. p. 63) Surely the Government cannot be permitted to take the position that petitioner's attack upon his commitment must fail because of the existence of constitutionally acceptable release provisions and at the same time block petitioner's attempt to demonstrate the constitutional infirmity of those provisions.

If we understand the Government correctly, its argument is based upon the premise that the release standards are capable of constitutional application in at least some instances, and that consequently it cannot be said that, had petitioner made an appropriate offer of proof with respect to his mental condition, the standards would have been invalidly applied. Under this view, petitioner's argument

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finding of present social dangerousness requiring further treatment and deprivation of liberty in a mental institution." (R. 5)

By describing the standard he maintained was constitutionally required —either an initial or at least an ultimate finding in a proceeding in which the Government would have the burden—surely petitioner was contending that the statutory standard was unconstitutional.

[12] Of course, it would have been futile for petitioner to devote much time in the lower courts to an attack upon the release standards, since the Court of Appeals had already rejected that attack in the past. Indeed, the argument on this point in our principal brief is based entirely upon the release provisions as they have been construed by the Court of Appeals.

must be regarded as an attack upon the release standards as they might be applied to others, and this is not permissible under the rule of *United States* v. *Raines*, 362 U.S. 17 (1960).

Such an argument misses the mark in all respects. Petitioner's argument is that the release standards that have been clearly delineated by the Court of Appeals are wholly invalid on their face and are incapable of constitutionally acceptable application in any case. If he is correct, then plainly he cannot be expected to make an offer of proof, since there are no constitutionally valid statutory standards against which that offer could be measured. Surely the courts below could not have fashioned a new standard for release out of whole cloth, and consequently petitioner could not be required to make an offer of proof measuring up to some standard that he (or a court) might consider valid had Congress enacted it. To put it another way, if the statutory standards governing release, as construed by the Court of Appeals, are invalid, then the commitment procedure is invalid (as the Government implicity concedes) and there is no warrant for petitioner's continued detention. Thus the Government's concern about the possible inability of petitioner "to satisfy any appropriate standard" is irrelevant (Govt. Br. p. 63); the question is simply whether petitioner can be held in custody when the *only* standard established by Congress, as construed by the lower courts, is constitutionally invalid. In short, petitioner *is* attacking the constitutionality of the release provisions as they affect him, *i.e.*, as they impose upon him constitutionally unacceptable conditions for the securing of his freedom.[13]

[13] Our discussion of sociopathic personalities (Br. p. 36) was designed only to assist in understanding the nature of the standards as defined by the Court of Appeals. At no point have we argued that petitioner should secure his release though not a sociopath because "it may be thought to be

Thus this case is entirely different from the two cases cited by the Government—*Raines*, where state officials challenged the consitutionality of a Civil Rights Act provision because it might be unconstitutional if applied to private citizens, and *Liverpool, N.Y.&P.S.S. Co.* v. *Commissioners*, 113 U.S. 33 (1885), where the Court remanded the case in order to ascertain whether the statute that was attacked was in fact applicable to the parties under the circumstances.

On the merits of the issue, we would like to add only a few remarks to what we have already said. In the first place, in our view *Leland* v. *Oregon*, 343 U.S. 790 (1952), which involved only questions relating to the latitude a state has in determining the conditions under which criminal responsibility will be fixed upon its citizens, can hardly be regarded as controlling with respect to the questions in the case at bar. All that can be said is that *Leland* establishes that imposition of a "beyond a reasonable doubt" burden of proof upon an individual is not in all circumstances decisive of the constitutional question. With this, of course, we agree. (Br. p. 35) Moreover, it might be added that *Leland* is not as far-reaching as the Government appears to believe even with respect to the issues decided there. It is not true that this Court affirmed the conviction "even though the State had imposed upon the defendant the burden of proving beyond a reasonable doubt the absence of one of the essential elements of murder, *i.e.*, that the defendant had a mind capable of committing that offense." (Govt.

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illegal to subject a sociopath to continuing confinement for failure to satisfy the requirements of the release statute." (Govt. Br. p. 64)

It may be noted also that, while we attack the statute "on its face" and "as applied," throughout we are speaking on the standards that affect petitioner directly. The "as applied" discussion is designed to afford a narrower basis for disposition, *i.e.*, the provisions are invalid at least where the individual objected to the raising of the insanity defense and where the crime with which he was charged was a non-violent misdemeanor. (Br. pp. 40-43)

Br. p. 71) Or, at any rate, this reading of state law was explicitly rejected by the majority.[14]

Nor are we impressed with the Government's contention that the courts should defer to the St. Elizabeths' authorities because they have the individual "under daily supervision" and because "[c]ourts . . . are not well-equipped to make medical findings." (Govt. Br. p. 73) To be sure, judges are not experts in the field of psychiatry, any more than they are experts with respect to a great many other problems that come before them. But they are experts in viewing in proper perspective the claims of narrower disciplines, and they are experts in making decisions that may run against the tide of popular opinion but that are demanded by the injunctions of the Constitution that has been entrusted to their care. In so acting, they are protected by the wisdom of the Founding Fathers, who, recognizing the necessity for placing the "Thou Shalt Nots" that safeguard our liberty in the hands of decision-makers possessing full independence, freed the judiciary from the claims of a volatile public opinion through the provisions of Article III of the Constitution. The staff members of St. Elizabeths, on the other hand, not only cannot be expected to share the judiciary's type of expertise, but do not share the judiciary's independence of decision.[15] In our view, a due regard for

[14] "Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including, in the case of first degree murder, premeditation, deliberation, malice and intent." *Id.*, at 794. See also *id.*, at 795.

[15] See, *e.g.*, Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 867, 947 n. 214 ("The hospital authorities are conservative about recommending release because of concern over public criticism in the event that the defendant commits another offense. The superintendent of St. Elizabeths Hospital has stated that, 'In the case of persons who have been arrested, particularly if charged with serious offenses, a greater degree of conservatism must be practiced in the matter of release, in consideration of the attitudes of the public.' Overholser, *The Present Status of Release of Patients from Mental Hospitals*, 29 Psychiatric Quarterly 372 (1955).")

these considerations compels the conclusion that the release provisions in effect in the District of Columbia depart radically from the allocation of decision-making power that is necesary to insure the preservation of fundamental freedoms.

H. *Deprivation of Right to Counsel*

Although we felt obliged to bring the issue of deprivation of counsel to the Court's attention after we discovered it in the record, we believe, as we have stated, that there are more appropriate grounds for disposing of the case. Nonetheless, we feel compelled to deal at least in summary fashion with the Government's argument on the merits of the issue. (Govt. Br. pp. 75-77)

First, since the Government seems not to urge with determination the contention that the Sixth Amendment right to counsel does not extend to misdemeanor cases, we will content ourselves with the observation that, as the Court of Appeals for the District of Columbia has recognized, there is nothing in the Sixth Amendment or in this Court's opinions to suggest that counsel may be denied a defendant who may be sent to jail for a year on a misdemeanor charge (in the instant case, for two years on consecutive sentences). *Evans* v. *Rives*, 126 F.2d 633 (1942).[16] We are aware of no decision to the contrary, nor does the Government cite any.[17]

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[16] See, *e.g.*, *Bute* v. *Illinois*, 333 U.S. 640, 660 (1948) ("The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment, which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense."); *Foster* v. Illinois, 332 U.S. 134, 136-137 (1944) ("By virtue of [the Sixth Amendment] . . . counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances.").

[17] None are cited in the secondary source referred to by the Government. (Govt. Br. p. 75 n. 68)

Next, we adhere to our position that in federal cases (and in state capital cases) no specific prejudice need be shown if assistance of counsel is not provided. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). Nor do we understand how the Government can read *Hamilton* v. *Alabama*, No. 32, O.T. 1961, to the contrary, for there the Court specifically stated that it would "not stop to determine whether prejudice resulted." (Slip Op. p. 3)

This does not mean, of course, that denial of assistance of counsel at any point after an accusation is necessarily a violation of the Sixth Amendment. It must be determined whether denial occurred at an important stage of the proceedings. See *Hamilton* v. *Alabama, supra.* In *Canizio* v. *New York*, 327 U.S. 82 (1946), and in the other cases cited by the Government, practically all of which involved absence of counsel at arraignment, the proceeding in question was not of sufficient importance to warrant invocation of the general rule. (For a contrary view, see *Evans* v. *Rives*, 126 F.2d 633, 641 (D.C. Cir. 1942); *Michener* v. *Johnston*, 141 F.2d 171, 174 (9th Cir. 1944); and *Robinson* v. *Johnston*, 50 F. Supp. 774, 778 (N.D. Cal. 1943).) Under such circumstances, a showing of specific prejudice is necessary, but not otherwise.

In the case at bar, we believe that failure to furnish counsel occurred at a critical stage of the proceedings. Concededly, counsel could have objected at the trial to the hospital report's containing a finding as to petitioner's sanity at the time of the crimes and to the fact that the report was submitted by the Assistant Chief Psychiatrist. However, it was at the arraignment that the court ordered the mental examination, and consequently it was at that time that counsel would be called upon to object that there

was insufficient warrant for such examination. It was at arraignment that counsel might also have attempted to plead guilty, and the trial judge might have been more amenable to receiving such a plea at that time. (We do not know whether, when petitioner attempted to enter a guilty plea subsequently, the trial judge treated it as an initial plea under Rule 9 or as an attempted withdrawal under Rule 20(d).) And it was at arraignment or immediately thereafter that counsel might have advised petitioner not to cooperate with the examining physician, at least with respect to matters relating to his sanity at the time of the crime. See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 867, 911-912 (1961) ("[E]ffective protection of the privilege against self-incrimination may also require that no accused person be examined who is not represented by counsel. Further, the rights of the accused would seem to require that he be advised that he need not cooperate with the government's psychiatrists, at least so long as he does not interpose an insanity plea."). See also *id.*, at 918-921. Under these circumstances, whatever may be the proper view of the significance of arraignment under other circumstances, where action is taken by the trial judge under section 301 at that time it seems clear that this is a stage in the criminal proceeding at which assistance of counsel is required by the Sixth Amendment.

Conclusion

For the foregoing reasons, as well as for the reasons given in our initial brief, it is our view that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and that the case should be remanded with directions that respondent be ordered to discharge petitioner from custody forthwith.

Respectfully submitted,

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